

1 PAUL B. SNYDER
2 United States Bankruptcy Judge
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December 20, 2007

MARK L. HATCHER
CLERK U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEPUTY

8 **UNITED STATES BANKRUPTCY COURT**
9 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

10 In re:

11 RODNEY A. CROW,

Debtor.

Case No. 07-40601

12 I. WAYNE CUNNINGHAM,

Plaintiff,

v.

16 RODNEY A. CROW,

Defendant.

Adversary No. 07-04077

MEMORANDUM DECISION

NOT FOR PUBLICATION

18 Trial was held in this matter on December 17, 2007. Plaintiff I. Wayne Cunningham
19 (Plaintiff), in accordance with his complaint, seeks a judgment against Defendant Rodney
20 Crow (Defendant) and to have such judgment declared nondischargeable pursuant to
21 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 1328(a)(2)¹. The Plaintiff also seeks to establish the
22 allowed amount of his proof of claim. At the conclusion of the trial, the Court took the matter
23

24
25 ¹Unless otherwise indicated, all "Code," Chapter and Section references are to the Federal Bankruptcy Code,
11 U.S.C. §§ 101-1532, as amended by BAPCPA, Pub. L. 109-8, 119 Stat. 23, as this case was filed after
October 17, 2005, the effective date of most BAPCPA provisions.

1 under advisement. This Memorandum Decision shall constitute Findings of Fact and
2 Conclusions of Law as required by Fed. R. Bankr. P. 7052. This is a core proceeding under
3 Title 11. The Court, accordingly, has the jurisdiction to enter a final order under 28 U.S.C.
4 § 1334(a) and (b), 28 U.S.C. § 157(a) and (b)(1).

5
6 **I**

7 **FINDINGS OF FACT**

8 The Plaintiff owns unimproved real property located at 1241 E. Timbertides Road,
9 Union, Mason County, Washington (Property). The Plaintiff resides on real property located
10 across Timbertides Drive and to the north of the Property. The Plaintiff uses the Property for
11 recreation, hiking, and wildlife viewing.

12 The Defendant owns a five acre parcel adjoining the Plaintiff's Property to the west
13 (Defendant's Property). In April, 2006, the Defendant hired a logging crew (Fitchitt) to cut
14 trees on the Defendant's Property. Pursuant to the parties' agreement, the Defendant would
15 receive 60% of the proceeds from the sale of any merchantable logs and Fitchitt would
16 receive 40%.

17 The Defendant did not have a survey done of his property before the logging
18 operations were commenced. Rather, the Defendant walked the property lines with Fitchitt
19 and placed tape markers on what he believed was the southern property line of his own
20 property. The tape markers placed by the Defendant did not end at the eastern property line
21 between his property and Plaintiff's, but continued along the Plaintiff's southern property line
22 and into the next adjoining parcel.

23
24 In the process of cutting timber on the Defendant's Property, the logging crew cleared
25 an estimated 14,850 square feet of the Plaintiff's Property and removed 24 trees. Ten

1 truckloads of trees were taken from the two properties and sold for approximately \$15,000.
2 The Defendant became aware of the trespass onto the Plaintiff's Property after the logging
3 commenced, but prior to completion. The Defendant did not immediately notify the Plaintiff of
4 the error or halt his timber cutting operations. Logging did cease when the Plaintiff and
5 several other neighbors confronted the Defendant on or about May 6, 2006.

6 At some point in time prior to the logging operations, the Defendant also excavated a
7 hole on a portion of the Plaintiff's Property and installed a series of plastic pipes to assist
8 water drainage from his own property. This hole has since been re-filled.

9 The Defendant filed a voluntary Chapter 13 bankruptcy petition on February 28, 2007.
10 The Defendant has filed several amended Chapter 13 plans. The Defendant's latest Chapter
11 13 plan was filed August 31, 2007, and proposes to pay 100% to unsecured creditors. The
12 plan has not been confirmed. This plan provides in paragraph 10 that confirmation will be
13 continued until the Plaintiff's claim is resolved. In order to calculate a plan payment the
14 Defendant assumes a claim value for the Plaintiff of \$40,000. On May 22, 2007, the Plaintiff
15 filed an unsecured proof of claim in the amount of \$75,936. The Defendant objected to the
16 claim and both parties agreed that the claim would be decided in this adversary proceeding.
17 The Plaintiff filed this complaint to determine dischargeability of debt on June 4, 2007.
18

19 II

20 CONCLUSIONS OF LAW

21 The parties do not dispute that a timber trespass occurred. The issue in this case is the
22 amount of damages that should be awarded and whether such damages are
23 nondischargeable in bankruptcy.
24
25

1 **Timber Trespass**

2 In Washington State, a person who, without lawful authority, cuts down trees, timber or
3 shrubs on another person's property is guilty of trespass and liable for treble damages.
4 RCW 64.12.030. However, if the "trespass was casual or involuntary" or the defendant had
5 "probable cause to believe that the land on which such trespass was committed was his own,"
6 the defendant is liable only for single damages. RCW 64.12.040. Once the plaintiff has
7 established the trespass, the burden shifts to the defendant to demonstrate that it was casual
8 or involuntary. Hill v. Cox, 110 Wn. App. 394, 406 (2002); Sherrell v. Selfors, 73 Wn. App.
9 596, 604 (1994).
10

11 The Defendant admits that a trespass occurred in this case. The burden therefore
12 shifts to the Defendant to establish mitigating circumstances. The Defendant argues that he
13 should not be liable for treble damages in this case because he took reasonable care to
14 ensure that the logging operations were restricted to his own property. The Defendant
15 testified that he walked his property lines with Fitchitt prior to logging. After walking the
16 property with Fitchitt, the Defendant also installed tape around trees along the southern
17 boundary. Tape was not placed to mark the north/south boundary between the Defendant
18 and Plaintiff's Property. Despite his instructions as to the proper boundary lines, the
19 Defendant testified that Fitchitt strayed beyond the boundary markers and logged on the
20 Plaintiff's Property. The Defendant argues that because of the precautions he took, he should
21 not be found liable for an intentional tort caused by an independent contractor. The Court
22 notes that Fitchitt did not testify in this case. Thus, the only testimony in evidence as to
23 Fitchitt's knowledge of the proper boundary lines comes from the Defendant himself.
24
25

1 The Court concludes that the Defendant has failed to meet his burden in establishing
2 mitigating circumstances that would allow only single damages against him. The Defendant
3 appears to be arguing that he should not be found liable for treble damages based on the
4 unauthorized acts of Fitchitt. Although a principal is generally not liable for the trespass of a
5 true independent contractor, liability is imposed when the principal provides negligent
6 directions, or fails to act upon becoming aware of the trespass. Ventoza v. Anderson, 14 Wn.
7 App. 882, 895 (1976). Both exceptions apply in this case.

8
9 The Defendant acknowledges that he did not have any type of survey conducted of his
10 property lines, nor did he physically mark the property lines running north to south between
11 his property and the Plaintiff's. He did mark what he believed was the southern property line
12 of his property, but for some unexplained reason, his markings did not stop at the boundary
13 between himself and the Plaintiff. Instead, the markings he placed continued along the
14 Plaintiff's Property, along the area that Fitchitt eventually logged, and into the next adjoining
15 parcel. No credible explanation for why the trees on the southern boarder of the neighboring
16 parcels were marked was provided.

17 The Court concludes that instructions given to Fitchitt by the Defendant were not
18 reasonable and were inadequate. Although he may have walked the property line with
19 Fitchitt, only the southern border was clearly marked and it was ambiguous in that it continued
20 on to the neighboring parcels. Without the aid of any clearly marked boundaries, the
21 Defendant is liable for the timber removal caused by Fitchitt on the Plaintiff's Property. See
22 also Henricksen v. Lyons, 33 Wn. App. 123, 126 (1982) (holding that treble damages were
23 proper where the defendant erroneously relied on an amateur survey).
24
25

1 The Defendant is also liable for Fitchitt's actions in failing to halt the operations upon
2 becoming aware of the trespass. As he resided on the property where the logging was taking
3 place, the Defendant's testimony is not credible that he was completely unaware of the timber
4 trespass until logging on the Plaintiff's Property was almost complete. The exact date on
5 which he became aware of the trespass is uncertain, but it is clear that he was aware of the
6 problem prior to being confronted by the Plaintiff and that he failed to immediately halt the
7 logging operations. The Defendant's only explanation for this failure was that he wanted to
8 get the logging completed before he informed the Plaintiff. Such explanation fails to relieve
9 him of liability caused by Fitchitt's actions.
10

11 The Court concludes that the Defendant has failed to establish mitigating
12 circumstances that would limit the damage award in this case to single damages.
13 Accordingly, treble damages against the Defendant are appropriate.

14 Where the timber trespass occurred on recreational property, the proper measure of
15 damages is the value of the trees removed plus replacement costs of residential/ornamental
16 trees and shrubs. See Birchler v. Castello Land Co., 133 Wn.2d 106, 111-12 (1997).

17 In valuing the trees removed, both parties' experts agreed that the trunk formula
18 method is the appropriate method for calculating damages. However, the values placed on
19 the 24 removed trees under the trunk formula by each expert varies significantly. The
20 Plaintiff's expert values the 24 removed trees at \$16,383, and the Defendant's expert values
21 these same trees at \$8,350. The primary difference between the two is the proper discount to
22 be applied due to location of the logged area. The Defendant's expert applied the maximum
23 discount for location and the Plaintiff's expert applied a much lower number. This has
24 resulted in the timber value being on either the extreme high or low end of the scales.
25

1 Although adjustments for factors such as location are somewhat subjective, the testimony of
2 the Plaintiff was persuasive that he valued the pristine and natural state of his Property. Such
3 value is applied to all of the trees on his Property despite the location. A maximum discount
4 to the value of the logged trees due to their remote location on the Property is therefore not
5 appropriate. After considering the testimony of the parties and of the Defendant's expert
6 witness, as well as the experts' reports, the Court determines that a preponderance of the
7 evidence indicates that a reasonable value for the 24 trees removed is \$14,000.
8

9 The Defendant's expert was of the opinion that no replacement of the trees or shrubs
10 removed or damaged was necessary. Replacement of damaged or cut trees and shrubs is,
11 however, a proper component of damages in a timber trespass case. Even though the parcel
12 at issue is unimproved, the Plaintiff testified that he uses the parcel for recreation and hiking
13 and that his intent was to maintain the Property in its natural state. The evidence indicates
14 that the replacement of damaged shrubs is necessary to return the Property to its natural
15 state. Thus, replacement costs are appropriate. The Court, however, also concludes that
16 some of the replacement costs suggested by the Plaintiff's expert are unreasonable.
17 Although some replanting of Evergreen huckleberry and Salal is appropriate, it is
18 unreasonable to incur the cost of 86 pots of each plant, nor is it necessary to incur the costs of
19 a three year maintenance program or continuous inspections by a certified arborist. Based on
20 a preponderance of the evidence provided, the Court concludes that a reasonable damage
21 award for the restoration costs is \$2,500.
22

23 Both experts agreed that the clean-up costs to remove the remaining debris from the
24 site would be \$1,300.
25

1 Accordingly, the most credible evidence is that the Plaintiff's damages for the timber
2 trespass are \$17,800. Trebled, this amount is \$53,400. The Court will also award the Plaintiff
3 his appraisal cost of \$970.

4 **RCW 4.24.630**

5 The Plaintiff states that he is proceeding in this case under both RCW 64.12.030 and
6 RCW 4.24.630. RCW 4.24.630(1) provides that "[e]very person who goes onto the land of
7 another and who removes timber, crops, minerals, or other similar valuable property from the
8 land, or wrongfully causes waste or injury to the land . . . is liable to the injured party for treble
9 the amount of the damages caused by the removal, waste, or injury." Further, RCW 4.24.630
10 awards a party aggrieved by that section their reasonable costs, "including but not limited to
11 investigative costs and reasonable attorneys' fees and other litigation-related costs." RCW
12 4.24.630(1).
13

14 The Plaintiff states that he seeks relief under RCW 4.24.630 for both his timber claim
15 and waste claim for the excavation and laying of pipes. Presumably, relief is sought under
16 this section as a basis for seeking attorney's fees and costs. However, RCW 4.24.630(2)
17 states that this section "does not apply in any case where liability for damages is provided
18 under RCW 64.12.030."
19

20 The Court agrees that the inclusion of the word "timber" in RCW 4.24.630 creates
21 some ambiguity, for it is difficult to conceive of a situation involving timber removal that would
22 not be covered by RCW 64.12.030. Whether any such factual scenario may or may not exist,
23 however, is not relevant. Liability for damages in this case is admittedly provided for by RCW
24 64.12.030. Thus, according to the plain language of RCW 4.24.630(2), the provisions of that
25 statute do not apply to the Plaintiff's claim for timber trespass.

1 Although this statute may provide a remedy for any damage caused by the excavation
2 and laying of pipes on the Plaintiff's Property, damage, if any, has been repaired. The Court
3 concludes that the Plaintiff is therefore not entitled to any damages based on the waste claim.

4 **Emotional Distress**

5 A party may recover emotional distress damages under RCW 64.12.030. Birchler, 133
6 Wn.2d at 116. Once a plaintiff proves intentional wrongful conduct, the "plaintiff is only
7 required to prove emotional distress in order to recover the damages attributable to the
8 wrongful act." Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 484 (1991). An award for
9 emotional distress damages need not be proved with mathematical certainty but must be
10 supported by competent evidence and must be proportional to the injury suffered. Hill v. GTE
11 Directories Sales Corp., 71 Wn. App. 132, 140 (1993). The law requires evidence of
12 emotional distress but does not require proof of objective symptoms, nor is the plaintiff
13 required to provide medical evidence or evidence that he sought medical attention for his
14 emotional distress. See Kloeppel v. Bokor, 149 Wn.2d 192, 197-98 (2003).

15
16 In this case, the Plaintiff testified that he suffered emotional distress in that he was
17 outraged and extremely upset upon discovering that the trees on his property had been cut.
18 The Plaintiff testified that he used this parcel of property for hiking and recreation and that his
19 intent was to keep it in a natural state. The Court finds the Plaintiff's testimony to be credible
20 and determines that an award of \$500 for emotional distress damages is both reasonable and
21 appropriate.
22

23 **11 U.S.C. § 523(a)(4)**

24 11 U.S.C. § 1328(a)(2) excepts from discharge, those debts determined to be
25 nondischargeable under 11 U.S.C. § 523(a)(4). The Plaintiff concedes that any damages

1 awarded for emotional distress fall under 11 U.S.C. § 523(a)(6), which is not covered by
2 11 U.S.C. § 1328(a)(1). The emotional distress damages awarded are thus dischargeable.

3 The Plaintiff alleges that a debt for timber trespass is nondischargeable under the
4 larceny exception to discharge in 11 U.S.C. § 523(a)(4). Larceny is the fraudulent and
5 wrongful taking and carrying away of the property of another with intent to convert the
6 property to the taker's use without the consent of the owner. Vans Inc. v. Rosendahl (In re
7 Rosendahl), 307 B.R. 199, 216 (Bankr. D. Or. 2004).

8
9 Creditors alleging nondischargeability under 11 U.S.C. § 523 have the burden of proof
10 of each element by preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291,
11 111 S. Ct. 654, 661 (1991). The Court concludes that the Plaintiff has failed to meet this
12 burden. Although the trespass was clearly negligent and reckless, the evidence does not
13 establish that it was fraudulent or that the Defendant knowingly cut the Plaintiff's timber with
14 the intent to convert it for his own use and profit. The parcels of the Defendant, Plaintiff and
15 their neighbors are relatively close together, and it is not conceivable that the Defendant could
16 have kept the timber trespass a secret from the Plaintiff for any length of time. Rather, the
17 evidence suggests that the Defendant negligently failed to properly mark his property lines so
18 that the proper boundaries were unclear to Fitchitt. The Defendant discovered the mistake
19 after the fact and should have informed the Plaintiff of the error immediately. Although such
20 failure renders him liable for treble damages under the state timber trespass statute, it does
21 not render the debt nondischargeable for larceny under 11 U.S.C. § 523(a)(4).
22

23 **Attorney's Fees:**

24 The only stated basis for awarding attorney's fees and costs in this case is RCW
25 4.24.630. As concluded above, the Court has determined that the Plaintiff is not entitled to

1 damages under RCW 4.24.630 for any waste caused by the excavation and laying of pipes.
2 There is therefore no basis for awarding attorney's fees and costs in this case.

3 In summary, the Plaintiff is awarded damages and an allowed proof of claim in the
4 Defendant's bankruptcy case in the amount of \$54,870. This award consists of the following:

5 Tree Value: \$42,000 (\$14,000 trebled)

6 Restoration: \$7,500 (\$2,500 trebled)

7 Clean-up: \$3,900 (\$1,300 trebled)

8 Appraisal: \$970

9 Emotional Distress: \$500

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11 **Total: \$54,870**

12 This debt is dischargeable in bankruptcy.

13 DATED: December 20, 2007

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15 Paul B. Snyder
16 U.S. Bankruptcy Judge
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